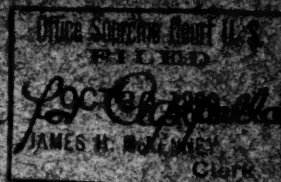


N<sup>o</sup>. 122.

Brief of Mynderse



Filed Oct. 30, 1899.

Supreme Court of the United States.

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No. 122.

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THE STEAMER GUIDO, JULIAN DE ORMAECHEA,

*Claimant-Appellant.*

*against*

THE UNITED STATES OF AMERICA,

*Libellants-Respondents.*

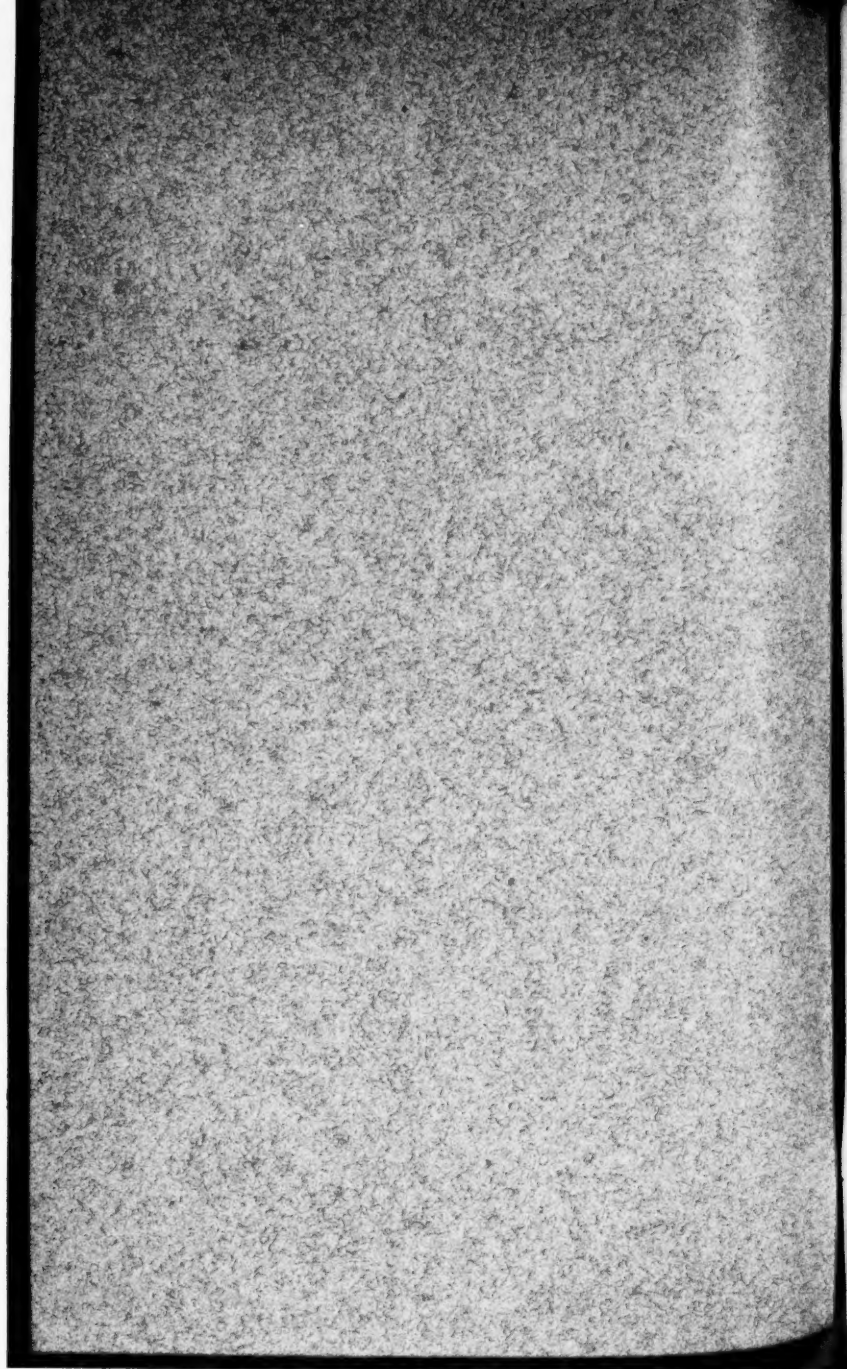
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Brief for Claimant and Appellant

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WILHELMUS MYNDERSE,

*Advocate.*



# Supreme Court of the United States.

THE STEAMER GUIDO, JULIAN DE ORMAE-  
CHEA,  
*Claimant and Appellant,*

*against*

THE UNITED STATES OF AMERICA,  
*Libellants and Respondents.*

No. 122.  
October Term,  
1899.

## BRIEF FOR THE APPELLANT.

### Statement of Facts.

This appeal runs from a decree of the District Court of the United States for the Southern District of Florida, bearing date May 27, 1898, condemning the steamer *Guido* as lawful prize of war in an action instituted in that Court by the United States of America.

The libel was filed April 28th, 1898 (*Libel*, p. 1), and on the same day process issued against the steamer, then lying in the port of Key West, Florida, and she was seized by the Marshal (*Monition and Return*, pp. 2, 3).

The time for the claimant to appear having been extended until May 23d, Julian de Ormaechea, the master of the steamer, on that day filed his claim "as bailee for the interests of the owners of the steamer according to the test affidavit" annexed to the claim (*Claim*, pp. 3, 4).

The depositions of the master and of Jesus Echevarria, the first officer, were taken *in preparatorio* upon the stand-

ing interrogatories by the Prize Commissioners upon the 14th day of May (*Depositions in Preparatorio*, pp. 21-27).

The case came on for trial before Judge Locke, and on the 27th day of May he made an order denying the application of the claimant for leave to take further or additional proofs (*Order*, p. 8), and entered a decree condemning the steamer as legal prize of war (*Decree*, p. 10).

On the same day the claimant filed assignments of error (*Ass. of Error*, pp. 10, 11), and gave notice of appeal in open court from the decree (*Notice of App.*, pp. 11, 12, *Abstract of Minutes*, p. 10).

The appeal was formally allowed by the District Judge (p. 12), and the appeal bond given by the claimant was approved by him. A citation thereupon issued which was served the same day upon the District Attorney (*Record*, p. 13).

The *Guido* was a steamer hailing from the port of Bilbao, Spain, where she was owned by the Compania de Navegacion la Flecha, a Spanish corporation.

She was documented to "navigate as a merchant vessel "according to established laws" (á navegar y comerciar bajo las reglas establecidas), with authority to engage in "legitimate commerce" (legítimo comercio) "so long as "she might sail under the Spanish flag without change of "her capacity, shape or equipment" (interin este buque se halle bajo el pabellon Espanol y no varie de capacidad y figura en el casco y aparejo).

*Royal Patent, Ex. C.*, pp. 36, 37.

She had been built in Belfast, Ireland, in 1883, for the Compania de Navegacion la Flecha. About that time she received a Spanish register and ever since then she has carried the Spanish flag and has been operated under the management of the house of G. H. Fletcher & Company, of Liverpool, England (*Test. Afft.*, p. 4; *Deps. in Prep. Ans. 9th Int.*, p. 22).

The Compania de Navegacion la Flecha is a corporation organized under the laws of the Kingdom of Spain. Its capital is divided into one thousand shares, of which two hundred shares have stood in the name of Thomas Hughes Jackson, and two hundred in the name William R. P. Jack-

son of the firm of G. H. Fletcher & Company, of Liverpool, both British citizens; while six hundred shares have stood in the names of Jose Serra y Font, Raimundo Realde Assua, and Ramon Real y Assua, residents and citizens of Spain (*Test. Afft.*, p. 5).

The certificates of all the shares of the corporation, however, have in fact been owned and possessed by Thomas Hughes Jackson, who for many years has thereby been constituted the sole beneficial owner of the steamer (*Test. Afft.*, p. 5).

The claimant became master of the *Guido* only four months before her capture, though he had been in the employ of her owners for nineteen years, and had known the steamer from the time she was built (*Test. Afft.*, p. 5; *Deps. in Prep. Ans. to 4th, 6th and 9th Ints.*, pp. 21, 22).

During the entire life of the steamer she was engaged in the transportation of cargo for hire as a merchant vessel under the management of G. H. Fletcher & Company of Liverpool. Her voyages have begun in Europe, where she has taken cargo for Cuban ports, from which ports, upon discharge of such cargo, she has proceeded to ports of the United States, where she has taken cargo for a port of discharge in Europe, the round voyage occupying about three months (*Test. Afft.*, p. 5).

The *Guido* had a cargo capacity of about 5,000 tons. On April 1st and 2nd, she took on board at Liverpool about 186 tons of cargo, and on April 5th, 6th and 7th at Santandar, Spain, about 300 tons, and at Corunna, Spain, about 200 tons, and on April 10th, at La Puebla, Spain, about 30 tons. The entire cargo was between 700 and 800 tons, and occupied only a small portion of the cargo capacity of the vessel. It consisted of rice, flour, potatoes, beans, and like general cargo (*Test. Afft.*, pp. 5, 6; *Deps. in Prep. Ans. to 8th Int.*, pp. 22, 25).

The cargo was shipped for delivery at Havana, Matanzas, and Cienfuegos, Cuba; it being the intent and purpose of the master to proceed from Cuba to a port of the United States for a return cargo, across the Atlantic (*Test. Afft.*, p. 6).

The entire freight upon the cargo shipped was less than \$4,000, a sum altogether insufficient to cover the expenses

of loading, transporting and delivering the cargo; and offering no inducement for the voyage, the entire inducement being the full cargo which the vessel would take in regular course from the United States to Europe, the freight upon which at the then current rates would be nearly, if not fully, \$30,000 (*Test. Afft.*, p. 6).

Upon clearing from Liverpool the master took out a bill of health defining that the vessel was "bound for a port in the United States of America, via Spain and Cuba" (*Ex. B*, p. 39).

The *Guido* sailed from Liverpool April 2nd, and from La Puebla, the last Spanish port, April 10th, and directed her course to Havana, as her first port of call (*Test. Afft.*, p. 6; *Deps. in Prep. Ans. to 7th Int.*, p. 21).

In regular course she had, at four o'clock A. M. of April 27th, reached a point fourteen miles northwest of Cardenas, Cuba, and about seventy miles from Havana, when she was captured by the United States ships of war *Machias*, *Terror* and *Foote*, and was sent in by them to Key West, where she and her cargo were libeled as prize of war, April 28th (*Libel*, p. 1; *Test. Afft.*, p. 6; *Deps. in Prep. Ans. to 3d Int.*, pp. 21-25).

The *Guido* carried no arms or ammunition or contraband goods, and made no resistance to the captors (*Test. Afft.*, p. 6; *Deps. in Prep. Ans. to 3d, 8th and 31st Ints.*, pp. 21, 22, 24, 25, 27). She carried no dispatches, and there were "no officers, soldiers or marines" on board (*Deps. in Prep. Ans. to 16th and 26th Ints.*, p. 23).

On April 20th the President of the United States approved the following joint resolution of the two houses of Congress:

"Resolved, By the Senate and the House of Representatives of the United States of America, in Congress assembled:

"FIRST.—That the people of the island of Cuba are, and of right ought to be, free and independent.

"SECOND.—That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the island of Cuba and with-



“draw its land and naval forces from Cuba and Cuban waters.

“THIRD.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

“FOURTH.—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.”

30 *U. S. Statutes at Large*, p. 738.

On the same day Luis Polo de Bernabe, the Spanish Minister to the United States, wrote as follows to the Secretary of State:

“LEGATION OF SPAIN,

“WASHINGTON, D. C., April 20, 1898.

“MR. SECRETARY:

“The resolution adopted by the Congress of the United States of America and approved to-day by the President is of such a nature that my permanence in Washington becomes impossible, and obliges me to request from you the delivery of my passports. The protection of the Spanish interests will be intrusted to the French Ambassador and to the Austro Hungarian Minister. On this occasion, very painful to me, I have the honor to renew to you the assurances of my highest consideration.

“LUIS POLO DE BERNABE.

“The Hon. JOHN SHERMAN, Secretary of State of the United States of America.”

Upon the following day the Minister of Foreign Affairs of Spain addressed the following letter to the United States Minister at Madrid:

“MADRID, April 21, 1898.

“Hon. STEWART L. WOODFORD,

“Minister of the United States of America.

“Dear Sir: In compliance with a painful duty I have the honor to inform Your Excellency that the

" President having approved a resolution of both  
 " Chambers of the United States, which in denying  
 " the legitimate sovereignty of Spain and threatening  
 " an immediate armed intervention in Cuba, is equiv-  
 " alent to an evident declaration of war, the Gov-  
 " ernment of His Majesty has ordered its Minister  
 " in Washington to withdraw without loss of time  
 " from the North American territory, with all the  
 " personnel of the Legation. By this act the diplo-  
 " matic relations which previously existed between  
 " the two countries are broken off, all official com-  
 " munications between their respective representa-  
 " tives ceasing, and I hasten to communicate this to  
 " Your Excellency in order that on your part you  
 " may make such dispositions as seem suitable. I  
 " beg Your Excellency to acknowledge the receipt of  
 " this note at such time as you deem proper,  
 " and I avail myself of this opportunity to reiterate  
 " to you the assurances of my distinguished con-  
 " sideration.

" P. GULLON."

At 6.30 A. M. on April 22d, Admiral Sampson, in com-  
 mand of the North Atlantic fleet, sailed from Key West to  
 undertake the blockade of that part of the northern coast  
 of Cuba extending from Cardenas to Bahia Honda (*Re-  
 port of Sec. of Navy, Nov. 15, 1898, accompanying Pres.'s  
 Message to Congress of December 5, 1898, Vol. II., p. 904*).

On that day the President issued the following pro-  
clamation:

" Whereas, by a joint resolution passed by the  
 " Congress and approved April 20, 1898, and com-  
 " municated to the Government of Spain, it was  
 " demanded that said Government at once relin-  
 " quish its authority and Government in the Island  
 " of Cuba and withdraw its land and naval forces  
 " from Cuba and Cuban waters; and the President  
 " of the United States was directed and empow-  
 " ered to use the entire land and naval forces of  
 " the United States, and to call into the actual  
 " service of the United States the militia of the  
 " several States to such extent as might be neces-  
 " sary to carry said resolution into effect; and  
 " Whereas, in carrying into effect said resolution,  
 " the President of the United States deems it  
 " necessary to set on foot and maintain a block-



“ade of the North coast of Cuba, including all  
 “ports on said coast between Cardenas and Bahia  
 “Honda, and the port of Cienfuegos on the South  
 “coast of Cuba;

“Now, therefore, I, William McKinley, President  
 “of the United States, in order to enforce the said  
 “resolution, do hereby declare and proclaim that  
 “the United States of America have instituted, and  
 “will maintain a blockade of the North coast of  
 “Cuba, including ports on said coast between Car-  
 “denas and Bahia Honda and the port of Cienfuegos  
 “on the South coast of Cuba, aforesaid, in pursu-  
 “ance of the laws of the United States and the law  
 “of nations applicable to such cases. An efficient  
 “force will be posted so as to prevent the entrance  
 “and exit of vessels from the ports aforesaid, Any  
 “neutral vessel approaching any of said ports, or  
 “attempting to leave the same, without notice or  
 “knowledge of the establishment of such blockade,  
 “will be duly warned by the Commander of the  
 “blockading forces, who will endorse on her register  
 “the fact, and the date, of such warning, where such  
 “endorsement was made; and if the same vessel  
 “shall again attempt to enter any blockaded port,  
 “she will be captured and sent to the nearest con-  
 “venient port for such proceedings against her and  
 “her cargo as prize, as may be deemed advisable.

“Neutral vessels lying in any of said ports at the  
 “time of the establishment of such blockade will  
 “be allowed thirty days to issue therefrom.

“In witness whereof, I have hereunto set my  
 “hand and caused the seal of the United States to  
 “be affixed.

“Done at the City of Washington, this 22d day  
 “of April, A. D. 1898, and of the Independence of  
 “the United States the one hundred and twenty-  
 “second.

“[SEAL.]

WILLIAM MCKINLEY.

“By the President:

“JOHN SHERMAN,

“Secretary of State.”

*Messages and Papers of the President, Vol.*  
*X., pp. 202, 203; 30 U. S. Statutes at*  
*Large, 1769.*

On the 25th of April, the following Act of Congress was  
 presented to and signed by the President:

“ *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* First, That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, Anno Domini, eighteen hundred and ninety-eight including said day, between the United States of America and the Kingdom of Spain.

“ SECOND.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect.

“ Approved April 25, 1898.”

30 *U. S. Statutes at Large*, 364.

On the 26th of April the President of the United States issued a further proclamation, as follows:

“ WHEREAS, By an act of Congress, approved April 25, 1898, it is declared that war exists, and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain; and

“ WHEREAS, It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this Government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris,

“ NOW, THEREFORE, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

“ FIRST.—The neutral flag covers enemy's goods with the exception of contraband of war.

“ SECOND.—Neutral goods not contraband of war are not liable to confiscation under the enemy's flag.

“ THIRD.—Blockades, in order to be binding, must be effective.

“ FOURTH.—Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading

" their cargoes and departing from such ports or  
 " places; and such Spanish merchant vessels, if  
 " met at sea, by any United States ship, shall be per-  
 " mitted to continue their voyage, if, on examination  
 " of their papers, it shall appear that their cargoes  
 " were taken on board before the expiration of the  
 " above term; Provided, that nothing herein con-  
 " tained shall apply to Spanish vessels having on  
 " board any officer in the military or naval service  
 " of the enemy, or any coal (except such as may be  
 " necessary for the voyage), or any other article  
 " prohibited or contraband of war, or any dispatch  
 " of or to the Spanish Government.

" FIFTH. - Any Spanish merchant vessel which,  
 " prior to April 21, 1898, shall have sailed from any  
 " foreign port bound for any port or place in the  
 " United States, shall be permitted to enter such port  
 " or place, and to discharge her cargo, and afterwards  
 " forthwith to depart without molestation; and any  
 " such vessel, if met at sea by any United States  
 " ship, shall be permitted to continue her voyage  
 " to any port not blockaded.

" SIXTH. -The right of search is to be exercised  
 " with strict regard for the rights of neutrals, and  
 " the voyages of mail steamers are not to be in-  
 " terfered with except on the clearest grounds of  
 " suspicion of a violation of law in respect of contra-  
 " band or blockade.

" In witness whereof, I have hereunto set my  
 " hand and caused the seal of the United States to  
 " be affixed. Done at the City of Washington on  
 " the 26th day of April, 1898, and of the Independ-  
 " ence of the United States the one hundred and  
 " twenty-second.

" WILLIAM MCKINLEY."

*Messages and Papers of the Presidents, Vol.*  
*X., pp. 204, 205; 30 Statutes at Large, 1770.*

The claimant of the *Guido* has assigned the following as the leading errors in the judgment appealed from:

(A.) That the said District Court did not hold that the steamer was privileged and exempt from condemnation under the fifth article or paragraph of the said proclamation.

(B.) That the said District Court did not hold that the said steamer *Guido* was privileged and exempt from capture and condemnation as being the property of neutrals.

(C.) That the said District Court did not authorize, allow and order further and additional proofs respecting the matters set forth in the claimant's test affidavit, or in respect of any of the matters therein set forth.

*Assignments of Error, p. 11.*

## POINTS.

### First.

IN CONSIDERING THE CONTENTIONS OF THE CLAIMANT, ESPECIALLY THOSE ARISING UNDER THE PROCLAMATION OF APRIL 26TH, IT IS NECESSARY TO CARRY IN MIND THE HUMANE AND LIBERAL POLICY WHICH HAS GOVERNED THE UNITED STATES IN THE PAST, AND ALSO TO CARRY IN MIND THE PERSONAL VIEWS OF PRESIDENT MCKINLEY.

For more than a century the United States of America have urged upon other nations the adoption of the rule that all private property at sea, whether belonging to neutrals or to enemies, should be free from capture, unless contraband of war or violating blockade.

In a letter addressed to Benjamin Vaughan under date of March 14th, 1785, Benjamin Franklin said:

“It is time, it is high time, for the sake of  
 “humanity that a stop was put to this enormity.  
 “The United States of America, though better situated than any European nation to make profit  
 “by privateering, are, as far as in them lies, endeavoring to abolish the practice, by offering in  
 “all their treaties with other powers, an article engaging solemnly that in case of future wars no  
 “privateer shall be commissioned on either side,  
 “and that *unarmed merchant ships on both sides*  
 “shall pursue their voyages unmolested. This will  
 “be a happy improvement of the law of nations.

“The humane and the just cannot but wish general success to the proposition.”

*Works of Franklin, Vol. 2, pp. 478-485.*

Under the administration of President Monroe, when John Quincy Adams was Secretary of State, the proposition was again put forward in correspondence between the Department of State and the foreign ministers of the United States. Under date of July 28th, 1823, Mr. Adams wrote to Mr. Richard Rush, United States Minister to Great Britain:

“It has been remarked that by the usages of modern war the private property of an enemy is protected from seizure and confiscation as such; and private war itself has been almost universally exploded *upon the land*. By an exception, the reason of which it is not easy to perceive, the private property of an enemy *upon the sea* has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of nations from their territories, has taken its last refuge upon the ocean, and there continued to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy. To a government intent, from motives of general benevolence and humanity, upon the final and total suppression of the slave trade, it cannot be unreasonable to claim her aid and co-operation to the abolition of private war upon the sea.  
“From the time when the United States took their place among the nations of the earth this has been one of their favorite objects.”

*5 American State Papers, 529.*

In the same year, under date of August 13, 1823, Mr. Adams wrote to Mr. Middleton, United States Minister to Russia:

“The principle upon which the Government of the United States now offers this proposal to the civilized world is, that the same precepts of justice, of charity, and of peace, under the influence of which Christian nations have, by common consent, exempted private property on shore from the destruction or depredation of war, require the same exemption in favor of private

“property upon the sea. If there be any objection to this conclusion, I know not in what it consists; and if any should occur to the Russian Government, we only wish that it may be made the subject of amicable discussion.”

Adams to Middleton: *Wharton's International Law Digest*, § 342, p. 261.

On January 5, 1835, Mr. Gallatin wrote to Mr. Everett:

“The British, in the case of war, seize every vessel in their ports belonging to the enemy. With this single exception, the relic of an age of barbarism and piracy and which makes part of the King's Droits of Admiralty, I am not aware that any civilized nation does at this time, *even in case of war, seize the property of private individuals which in time of peace has been trusted to the hospitality and good faith of the country.*”

*Gallatin's Writings*, 2, p. 476.

A provision has been incorporated from time to time in the treaties negotiated between the United States and certain foreign nations, relieving from capture and seizure, in the event of war, the private property of their respective citizens, excepting contraband of war. The first instance of such a treaty is that between the United States and Prussia, referred to by President Adams in his special message to Congress of March 15, 1826, when he states that the treaty is

“memorable in the diplomatic annals of the world,  
“and precious as a monument of the principles in  
“relation to commerce and maritime warfare, with  
“which our country entered upon her career as a  
“member of the great family of nations.”

Other instances of similar treaty engagements are the treaty with Bolivia in 1858 (*Treaties and Conventions between the United States and other Powers*, 90, 93), and the treaty with Italy of 1871 (*Id.*, 581, 584).

Following the treaty of peace signed at Paris between France and Russia in 1856, the signatories framed a declaration known as the Declaration of Paris, as follows:

“1. Privateering is and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, except contraband of war, are not liable to capture under the enemy's flag.

"4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient in reality to prevent access to the coasts of the enemy."

The United States, almost alone among the nations of the world, withheld its signature from the Declaration of Paris, not, however, through any disapproval of the principles of the Declaration; but because the Declaration, while abolishing privateers, did not accord exemption from capture to all private property at sea.

President Pierce, two years before the date of the Declaration of Paris, in his second annual message to Congress, Dec. 4, 1854, had said:

"Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground."

*Richardson's President's Message, Vol. 5, p. 275.*

In 1856 he made the Declaration of Paris a subject of comment in his fourth annual message to Congress saying:

"I have expressed a readiness on the part of this Government to accede to all of the principles contained in the declaration of the conference of Paris, provided that the one relating to the abandonment of privateering be so amended as to effect the object for which, as is presumed, it was intended—the immunity of private property on the ocean from hostile capture. To effect this object it is proposed to add to the declaration that 'privateering is and remains abolished' the following amendment: 'and the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public armed vessels of the other belligerent,



“ ‘except it be contraband.’ This amendment has  
 “ been presented not only to the powers which have  
 “ asked our assent to the declaration to abolish  
 “ privateering, but to all other maritime nations.”

The subject received fresh consideration from our Government on the occasion of the revolt of the Southern States in 1861.

Mr. Seward, the Secretary of State, in addressing the United States Ministers in European countries, April 24, 1861, wrote:

“ For your own information it will be sufficient  
 “ to say that the President adheres to the opinion  
 “ expressed by my predecessor, Mr. Marcy, that it  
 “ would be eminently desirable for the good of all  
 “ nations that the property and effects of private  
 “ individuals not contraband should be exempt from  
 “ seizure and confiscation by national vessels in  
 “ maritime war.”

*Wharton's International Law Digest*, § 342,  
 p. 275.

At that time the United States expressed to the European powers its inclination to accept in full the terms of the Declaration of Paris, but Great Britain and France, and perhaps other nations, apprehended that our adhesion at that time might occasion awkward predicaments in view of the naval operations likely to be undertaken by the Southern States.

*Douglas Owen's Declaration of War*, p. 33.

Reservations were therefore suggested, which led to the United States Government abandoning for the time their request to be made parties to the Declaration.

Mr. Seward, then Secretary of State, writing to Mr. Adams, Minister to Great Britain, expressed his regret at the attitude of Great Britain, and further said:

“ It is my desire that we may withdraw from the  
 “ subject carrying away no feelings of passion, preju-  
 “ dice or jealousy, so that in some happier time it  
 “ may be resumed, and the important objects of the  
 “ proposed convention may be fully secured. I be-  
 “ lieve that that propitious time is even now not

“ far distant, and I will hope that when it comes  
 “ Great Britain will not only willingly and uncondi-  
 “ tionally accept the adhesion of the United States  
 “ to all benignant articles of the declaration of the  
 “ Congress of Paris, but will even go further, and,  
 “ relinquishing her present objections, as the *United*  
 “ *States have so constantly invited, that the private*  
 “ *property, not contraband, of citizens and subjects*  
 “ *of nations in collision shall be exempted from con-*  
 “ *fiscation equally in warfare waged on land and*  
 “ *in warfare waged upon the seas, which are the*  
 “ *common highways of all nations.*”

Seward to Adams: *Wharton's International Law Digest*, § 342, pp. 285-286.

While there has not been a permanent acceptance by all nations of the principle that private property at sea should be exempt from capture, much has been done towards ameliorating the hardships of the original rule which imposes the penalty of capture upon all enemy property at sea.

In the treaty of Aix la Chapelle, between France and Spain on the one side, and England on the other, it was agreed that all prizes taken before the formal declaration of war should be restored.

*Vattel (Chitty & Ingraham's edition), Vol. III., p. 316.*

In 1859, France and Sardinia, in signing a treaty of peace at Zurich, agreed that:

“ to diminish the evils of war, and by an exceptional  
 “ departure from the law generally observed, the  
 “ captured Austrian vessels which have not yet been  
 “ condemned as prizes, shall be restored.”

In the Austro-Prussian war of 1866 the principle of inviolability was adhered to by both parties. Germany proclaimed the same principle in 1870.

*Wheaton's Elements of International Law.*

In the earliest days of the Franco-German war of 1870, Baron Gerolt, United States Minister from North Germany to the United States, communicated to the Secretary of

State this despatch from Count Bismarck, Chancellor of North Germany:

“BARON GEROLT, Washington.

“For your guidance, private property on high seas will be exempt from seizure by his Majesty’s ships, *without regard to reciprocity*.

“BISMARCK.”

Secretary Fish, in acknowledging this letter, made it the subject of congratulation and rejoicing that the “great and enlightened German Government” proposed to adhere to the principle which had been “advocated by this Government whenever opportunity has offered,” adding

“Count Bismarck’s despatch communicated in your letter of the 19th instant shows that North Germany is willing to recognize this principle (even without reciprocity) in the war which has now unhappily broken out between that country and France. This gives reason to hope that the Government and people of the United States may soon be gratified by seeing it universally recognized as another restraining and harmonizing influence imposed by modern civilization upon the art of war.”

*Foreign Relations 1876, p. 272.*

Moreover, days of grace to shipping are now almost universally accorded at the opening of hostilities.

“On the outbreak of hostilities the right of capture at once becomes active, but having regard to the example in moderation set by the belligerent powers in recent wars, it is not unreasonable to suppose the right to capture any enemy vessels within the dominions on the outbreak of hostilities, will henceforth be postponed. Thus, in the war with Russia in 1854, six weeks was allowed for Russian merchant vessels within British territory to load and proceed; whilst such vessels which had sailed for British ports prior to the outbreak were permitted to enter, discharge and proceed unmolested to any port not blockaded. And on the occurrence of the Franco-German war in 1870, thirty days were allowed for German

“merchant vessels in French ports, to load or unload and depart, whilst those vessels which had sailed prior to the war with cargoes on French account were also to be free from capture. To French vessels in German ports a period of six weeks was allowed in which the vessels might load or unload and depart.”

*Douglas Owen's Declaration of War, p. 53.*

“Formerly, on the outbreak of war, no time was lost in seizing enemy shipping. That it had entered the national ports in time of peace and in good faith counted for nothing. Modern usage tacitly condemns such a breach of the national good faith, and substitutes for it a certain period of grace or ‘law,’ during which the enemy’s merchant vessels may complete the work of discharge or shipment, and proceed in safety to their destination. Thus, in 1854 (Crimean war) Russian merchant vessels in our dominions were allowed six weeks in which to depart. Subsequently, a further thirty days was allowed to Russian vessels in our Indian or Colonial waters. In 1870 (Franco-German war) thirty days were allowed to German vessels in French ports, and to French vessels in German ports six weeks. And in 1897 (Greco-Turkish war) a period of fifteen days was allowed for the clearance of Greek vessels from Ottoman ports, and of Ottoman vessels from Greek ports. From which it may be inferred, though perhaps not taken for granted, that in future, on the outbreak of war, each belligerent will allow ample time for the safe departure of the enemy’s shipping at that time within the national dominions. It was further ordered in 1854, that Russian vessels, on a voyage to any port in the British dominions, should be permitted to enter, discharge and proceed in safety to any port not blockaded.”

*Douglas Owen's Maritime Warfare & Merchant Shipping, p. 5.*

Spain, by her proclamation of April 23d, allowed thirty days grace to merchant ships of the United States, and gave immunity to neutral ships and their cargoes and to neutral merchandise on enemy’s ships.

"In 1866 it was agreed between Austria on the  
 "one hand, and her adversaries Prussia and Italy  
 "on the other, that enemy merchandise and enemy  
 "merchant ships should both be exempt from cap-  
 "ture on the high seas. And in the war between  
 "France and Prussia in 1870, the latter power is-  
 "sued a declaration that all French merchant ves-  
 "sels should be exempt from capture. This decree  
 "was, however, subsequently annulled in conse-  
 "quence of France having refused to waive her  
 "right of capture of Prussian merchant vessels."

*Douglas Owen's Declaration of War, 35.*

With the full record before him of our own nation's views, and with knowledge of the action taken by other nations in recent wars, President McKinley, in the preamble of his proclamation of April 26th, announced his desire

"that the war should be conducted upon principles  
 "in harmony with the present views of nations  
 "and sanctioned by recent practice."

*Messages and Papers of the Presidents, Vol.*  
*X., p.204; 30 U. S. Statutes at Large, 1770.*

That the President was in full personal accord with the principles for which our government has stood from its beginning, is shown by his second annual message to Congress, dated December 5, 1898, after the close of the war with Spain.

"The experiences of the last year bring forcibly  
 "home to us a sense of the burdens and waste of  
 "war. We desire, in common with most civilized  
 "nations, to reduce to the lowest possible point the  
 "damage sustained in time of war by peaceable  
 "trade and commerce. It is true we may suffer in  
 "such cases less than other communities, but all  
 "nations are damaged more or less by the state of  
 "uneasiness and apprehension into which an out-  
 "break of hostilities throws the entire commercial  
 "world. It should be our object, therefore, to  
 "minimize, so far as practicable, this inevitable  
 "loss and disturbance. This purpose can prob-  
 "ably best be accomplished by an international  
 "agreement to regard all private property at sea

"as exempt from capture or destruction by the  
 "forces of belligerent powers. The United States  
 "Government has for many years advocated this  
 "humane and beneficent principle, and is now in  
 "position to recommend it to other powers with-  
 "out the imputation of selfish motives. I there-  
 "fore suggest for your consideration that the Ex-  
 "ecutive be authorized to correspond with the  
 "governments of the principal maritime powers  
 "with a view of incorporating into the permanent  
 "law of civilized nations the principle of the ex-  
 "emption of all private property at sea, not con-  
 "triband of war, from capture or destruction by  
 "belligerent powers."

*Messages and Papers of the Presidents, Vol.*  
*X., pp. 191, 192.*

In the same message he referred to a proposition which  
 had been made by the Tsar of Russia, as follows:

"The proposal of the Tsar for a general reduction  
 "of the vast military establishments that weigh so  
 "heavily upon many people in time of peace was  
 "communicated to this Government with an  
 "earnest invitation to be represented in the con-  
 "ference which it is contemplated to assemble with  
 "a view to discussing the means of accomplishing  
 "so desirable a result. His Majesty was at once  
 "informed of the cordial sympathy of this Govern-  
 "ment with the principle involved in his exalted  
 "proposal and of the readiness of the United States  
 "to take part in the conference. The active military  
 "force of the United States, as measured by our  
 "population, territorial area, and taxable wealth,  
 "is, and under any conceivable prospective condi-  
 "tions must continue to be, in time of peace so  
 "conspicuously less than that of the armed powers  
 "to whom the Tsar's appeal is especially addressed  
 "that the question can have for us no practical  
 "importance save as marking an auspicious step  
 "toward the betterment of the condition of the  
 "modern peoples, and the cultivation of peace and  
 "good-will among them; but in this view it be-  
 "hooves us as a nation to lend countenance and aid  
 "to the beneficent project."

*Messages and Papers of the Presidents, Vol.*  
*X., pp. 188, 189.*

In furtherance of the President's proposition that he be authorized to correspond with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of exemption of private property at sea, the Committee on Foreign Affairs of the House of Representatives on January 30, 1899, reported favorably this concurrent resolution, which had been originally introduced by Mr. Dingley:

"Whereas, the President of the United States, in his annual message communicated to Congress, December 5, 1898, recommended, amongst other things, that Congress empower him to enter into correspondence with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all property at sea, not contraband of war, from capture or destruction by belligerent powers; and

"Whereas, such recommendation is in accordance with the policy of the Government of the United States in this regard for more than a century, and the present is eminently a fitting and opportune time for effecting the exemption of non-offending commerce; now therefore be it

"Resolved, That the recommendations of the President in regard to the freedom from capture of non-offending commerce on the sea during war be and hereby are approved and adopted, and that the President of the United States and the Secretary of State thereof be and hereby are authorized to enter into correspondence with the governments of other nations with a view of obtaining, under proper rules and regulations of international law, the exemption of all private property at sea from capture or destruction by belligerent Powers, whether belonging to citizens of neutral or belligerent nations, unless contraband or violating blockades, and to take measures to carry out these resolutions as in their discretion shall be proper."

*House Report No. 1874, Fifty-fifth Congress,  
Third Session*

The same resolution was introduced in the Senate, December 15th, 1898, by Senator Platt of Connecticut.

*Cong. Res., Senate No. 51.*



No final action was taken by Congress upon the resolution, as it was deemed that the Peace Conference which was to assemble at the Hague upon the invitation of the Tsar, and to which the President in due course appointed delegates, would properly consider the subject.

The delegates from the United States attended the Peace Conference under full instructions from our Government. They formally presented to the Conference June 20th, 1899, a printed motion addressed to His Excellency M. De Staal, as President of the Conference, as follows:

"In accordance with instructions from their Government, the Delegation of the United States desire to present to the Peace Conference, through Your Excellency, as its President, a proposal regarding the immunity from seizure on the high seas in time of war of all private property, except contraband. \* \* \*

"The proposition *which we are instructed to present* may be formulated as follows: \* \* \*

"The private property of all citizens or subjects of the signatory powers, with the exception of contraband of war shall be exempt from capture or seizure on the high seas, or elsewhere, by the armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers.' \* \* \*

"The fact that we have received the instructions herein referred to *from the President of the United States* shows that the scope of the conference was believed by our Government to be wide enough to include this question." \* \* \*

"The Delegation of the United States of America respectfully request that the matter be submitted by Your Excellency to the proper Commission or to the Conference itself, that it may be decided whether our proposal is among those which should now be considered.

"ANDREW D. WHITE, President.

"SETH LOW.

"STANFORD NEWELL.

"A. T. MAHAN.

"WILLIAM CROZIER.

"FREDERICK W. HOLLS."

Upon the discussion of the motion the Conference determined that the subject matter was not within the scope of the call issued by the Tsar, and that it could not, therefore, receive consideration, the European delegates being without instructions from their several Governments. It was, therefore, remitted to a future Conference.

We submit that in construing the proclamation of a President who has put himself in line with the foremost reformers for the protection of private property at sea in times of war, the most liberal interpretation which his words will bear should be given to the language used by him.

## **Second.**

THE GUIDO WAS PRIVILEGED AND EXEMPT FROM CAPTURE  
AND CONDEMNATION UNDER THE FIFTH ARTICLE OR PARAGRAPH  
OF THE PROCLAMATION OF APRIL 26TH.

The fifth article of the proclamation is:

“FIFTH. – Any Spanish merchant vessel which,  
“ prior to April 21, 1898, shall have sailed from any  
“ foreign port bound for any port or place in the  
“ United States, shall be permitted to enter such  
“ port or place and to discharge her cargo, and afterwards  
“ forthwith to depart without molestation;  
“ and any such vessel, if met at sea by any United  
“ States ship, shall be permitted to continue her  
“ voyage to any port not blockaded ”

It was closely modelled upon Her Majesty's Order in Council of March 29, 1854, issued at the beginning of the Crimean war, which read:

“ Any Russian merchant vessel which prior to  
“ the date of this order shall have sailed from any  
“ foreign port bound for any port or place in Her  
“ Majesty's dominions, shall be permitted to enter

“such port or place, and to discharge her cargo, and  
 “afterwards forthwith to depart without molesta-  
 “tion; and any such vessel, if met at sea by any of  
 “Her Majesty’s ships, shall be permitted to con-  
 “tinue her voyage to any port not blockaded.”

*Spink’s Prize Cases, Appendix iii.*

War had been declared by Great Britain against Russia on the 29th of March, and the Order in Council was issued on the same day. The full text of the Order appears in the appendix to Spink’s Prize Cases, and a copy is annexed to this brief.

The language of the proclamation is clear, and suffices, whether construed in the letter or in the spirit, to relieve the *Guido* from condemnation.

The spirit of the rule is apparent. During long years of peace foreign commerce had been invited and encouraged by our country. Spanish merchant vessels under such invitation and encouragement had formed commercial associations with our citizens. They had entered upon lines of trade which brought them to our shores and into our ports. Upon our invitation they left their own waters and the protection of their own Government and freely crossed the ocean and placed themselves within the sphere of our power and within the grasp of our authority.

It would be a direct breach of international good faith to capture and condemn a merchant vessel thus situated.

It was intended by the Proclamation to give to all such vessels at least one chance for safety. If they brought cargo into our country they were to be permitted to free themselves from the embarrassment of their cargo, and go unmolested to any unblockaded port, whether a neutral port or an enemy port. If they were taking cargo, they were to be permitted to complete their loading within reasonable limits of time.

The *Guido* is a conspicuous example of the class of vessels for which protection was intended.

For fourteen years she had been documented as a Spanish merchant vessel, authorized to engage in legitimate

commerce (*Ex. A*, pp. 36, 37). During those years she had followed a regular course of trade under the management of G. H. Fletcher & Company, of Liverpool, England (*Test. Affl.* p. 6).

“ Her voyages have begun in Europe, where she  
 “ has taken such cargo as was procurable for Cuban  
 “ ports, from which ports, upon discharge of such  
 “ cargo, she has proceeded to ports of the United  
 “ States, where she has taken cargo for port of  
 “ final destination in Europe, either under charter  
 “ or on the berth, such cargo from the United  
 “ States being the principal cargo of the round voy-  
 “ age, and the round voyage occupying about three  
 “ months, and she making in regular course about  
 “ four voyages a year.”

*Test. Affl.*, p. 5.

Upon the voyage of her capture she took cargo, scarcely one-seventh of a full cargo, at Liverpool and certain Spanish ports, for Havana, Matanzas and Cienfuegos, and sailed from the last port nearly two weeks before the outbreak of war.

The claimant asserts in his test affidavit that the steamer was bound for a port in the United States in accordance with the uniform practice of the owners of the steamer, by which, upon the discharge of her Cuban cargo, she had in the past proceeded to the United States to load. The United States port of loading had not been designated to the claimant before he left Europe (*Test. Affl.*, p. 6).

The *bona fides* of the claim does not, however, rest solely upon the claimant's assertion. It is fully supported by the documents which were seized and sealed by the captors at the time of the capture.

Among such documents was the bill of health taken out by the master at Liverpool April 1st, 1898, in clearing from that port. It was issued by the Consul of the United States at Liverpool, and thus describes the vessel:

“ Vessel engaged in Atlantic trade, and plies  
 “ between Liverpool, Spain, Cuba and the United  
 “ States.”

It then gives the sanitary details of the vessel and her cargo and of the port of departure, and closes with the following certificate:

"I certify that the vessel has complied with the  
 "rules and regulations made under the Act of February 15, 1893, and that the vessel leaves this  
 "port bound for a port (unknown) in the United  
 "States of America via Spain and Cuba (ports unknown).

"Given under my hand and seal this first day of  
 "April, 1898.

"W. J. SULIS,

"Vice and Deputy Consul of the  
 "United States of America  
 "at Liverpool."

The document is endorsed as follows, the italicized portions being in writing, and the other portions in print:

"Bill of Health;  
 "Port of *Liverpool*;  
 "Name of vessel *Guido*;  
 "Name of Master, *Ormaechea*;  
 "From *Liverpool, Spain and Cuba*;  
 "To a port in the U. States;  
 "Date of Issue, *1st April 1898.*"

(*Ex. B., pp. 38, 39.*)

The certificate of the Consul that the vessel was "bound for a port in the United States" accords specifically with the President's proclamation designating as privileged vessels those bound for a "port or place in the United States."

The last port at which the *Guido* had stopped prior to her capture was the foreign port of La Puebla on the 10th of April.

*Test. Afft., p. 6; Deps. in Prep. Ans. to 7th Int., pp. 21, 22, Log Book.*

We submit that upon the proofs thus found among the ship's documents, and without further proofs, the vessel was within the provisions of the fifth article of the proclamation.

Moreover, the assertion of the master that the *Guido's* trade lay, not upon this voyage alone, but regularly, to the United States, is sustained by the ship's documents.

The bill of health describes her as a "vessel engaged in "Atlantic trade and plies between Liverpool, Spain, Cuba "and the United States" (*Ex. B*, p. 38).

The master, in his test affidavit, asserts that such trade brought her regularly within the United States at intervals of about three months (*Test. Afft.*, p. 5).

This statement is supported by the proofs.

Among the ship's papers, sealed by the captors, were certain certificates of the payment of tonnage duty in the United States.

Two of these certificates are printed in the record, Exhibit C and Exhibit D (*pp.* 40, 41). Exhibit C shows that the *Guido* paid \$123.90 at New Orleans, December 7, 1897; and Exhibit D certifies again to that payment and to the payment of the further amount of \$123.90 at New Orleans, February 21, 1898.

If she had been left to run her course and had not been interrupted by the state of war, she would have made another payment upon arrival in the United States in May, 1898.

The Act of Congress, under which tonnage duties are paid, provides for the payment of a stated rate per voyage, not exceeding a stated amount—five times the voyage rate—in any one year. The rates vary according to the ports, and according to the nationality of the vessel, being subject frequently to reciprocity treaty engagements; but it is important for a vessel to preserve among her papers only the receipts for the current year, which accounts for the fact that the *Guido's* receipts do not run further back than Exhibit C.

23 *U. S. Statutes at Large*, p. 57.

Not only was the *Guido* engaged regularly in trade with the United States, but that trade was the inducing cause which led her into North American waters. She was a large steamer of over 3,000 tons gross register (*Test. Afft.*, p. 6; *Ex. A*, p. 36). She had a cargo capacity of about 5,000 tons measurement; or of about 4,400 dead weight.

The cargo which she took on board in England and Spain for Cuba was between 700 and 800 tons, scarcely one-seventh of a full cargo. The entire freight list on the cargo did not exceed \$4,000, which sum the claimant asserts was "altogether insufficient" to cover the expenses of receiving, transporting and delivering the cargo, and

"offered no inducement to bring the vessel across  
 "the Atlantic, the sole inducement being the full  
 "cargo which the vessel would take in regular  
 "course from the United States to Europe, the  
 "freight upon which at current rates would be  
 "nearly, if not fully, \$30,000" (*Test. Aftt.*, p. 6).

The principal venture of her contemplated business was the cargo to be taken from the United States. Except for that inducement the vessel would not have been found within the sphere of our operations.

Having trusted to our good faith, the steamer is entitled not only to a literal, but also to a reasonable and liberal construction of the President's proclamation.

She left Europe eleven days before the date which is now assigned as the beginning of the war. At the time of capture she had been at sea for seventeen days, and her master was in entire ignorance of any state of war, and without any notice thereof, and therefore of course without notice of any blockade of the coast of Cuba (*Test. Aftt.*, p. 6).

She carried no arms, no military or naval officers, no contraband of war, no dispatches (*Deps in Prep. Ans. to 3d, 8th, 16th, 26th and 31st Ints.*, pp. 21-25, 27). She was entitled, therefore, to all the privileges accorded by the proclamation.

The first intimation which came to her master that the *Guido* was not an inoffensive merchant vessel was in the way of shots fired by the United States ships of war *Machias* and *Terror* (*Test. Aftt.*, p. 61).

The mere circumstance that the *Guido* had ports of call in Cuba did not divest her of the privileges which be-



longed to her as a vessel bound from Antwerp to the United States.

The doctrine of continuous voyages was practically established by the courts of the United States and was applied conspicuously in this Court in the following cases:

*The Circassian*, 2 Wall., 130,  
*The Bermuda*, 3 Wall., 551,  
*The Stephen Hart*, 3 Wall., 559,  
*The Springbok*, 5 Wall., 1,  
*The Peterhoff*, 5 Wall., 28.

Those cases generally related to vessels engaged in the transportation of cargoes (ultimately destined for the Confederates) to Nassau or other neutral port, in contemplation that the cargoes might be forwarded directly or indirectly in the same or other bottoms to final destination.

Most of the vessels were captured between England and the neutral port, and were condemned under the doctrine of continuous voyages. In one case it was said:

“ It is an undoubted and general principle, recognized in this Court in the case of the *Bermuda* and several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.”

*The Peterhoff*, 5 Wall., 28, 54.

We appreciate that in arriving at this doctrine of continuous voyages the Courts have been guided by the acute senses with which persistent and ingenious violators of the law are followed.

But the findings and conclusions of the Court are pertinent to the claimant of the *Pedro*.

There was a case in this Court still earlier than those above cited. The *Joseph*, a vessel of the United States, with full knowledge of the War of 1812, carried a cargo from St. Petersburg to London. She then started in bal-

last for New York, and, on that stage of her voyage, was captured and was proceeded against upon charges of trading with the enemy.

She pleaded that she had finished the offensive voyage, and asked for the application of the usual rule upon that plea, but Mr. Justice Washington said:

“ It is not denied that if she be taken during  
 “ the same voyage in which the offense was com-  
 “ mitted, she is considered as being still *in delicto*,  
 “ and subject to confiscation; but it is contended  
 “ that her voyage ended at London; and that she  
 “ was on her return embarked on a new voyage.  
 “ This position is directly contrary to the facts of  
 “ the case. The voyage was an entire one from the  
 “ United States to England; thence to the north of  
 “ Europe, and thence, *directly or indirectly*,  
 “ to the United States. Even admitting that the  
 “ outward and the homeward voyages could be sepa-  
 “ rated so as to render them two distinct voyages  
 “ which is not conceded, still *it cannot be denied*  
 “ *that the termini of the homeward voyage were*  
 “ *St. Petersburg and the United States* \* \* \*  
 “ It was, in short, a voyage from St. Petersburg to  
 “ the United States by way of London.”

*The Joseph*, 3 Cranch., 451, 455.

So the *Joseph*, though in ballast bound to her home port, was condemned because the stage from London to New York and the stage from St. Petersburg to London were considered parts of the same voyage.

The rules of this Court respecting continuous voyages are too strongly supported by logic and are framed in language too explicit to become meaningless when invoked by the claimant of the *Guido*.

It is true that the *Guido* carried no cargo destined for the United States; but we submit that the argument of the District Judge that she is in any way disentitled to relief because she was coming to the United States only “ to take property away ” is of no weight (*Opinion*, p. 34). Immunity was not given for any selfish reason but in recognition of our moral obligation to treat fairly those

non-belligerents with whom we had cultivated commercial intercourse, and who consequently found themselves or their property within the circle of warlike operations.

The further argument of the District Judge that the *Guido* was in the meantime carrying on commerce between the enemy's ports would furnish no reason to condemn her, even if accurate in point of fact. It would have been a mere incident of the trade in which she was customarily engaged, and in respect of which it was designed to give her protection.

If the trade promised to be violative of blockade, she might properly be restrained by notification of the existence of war and of the proclamation of blockade, in accordance with the provisions contained in the proclamation of April 22nd, for warning neutral or friendly vessels.

30 *U. S. Statutes at Large*, 1769; *supra*, pp. 6, 7.

As a privileged vessel, the *Guido* was entitled to the same notice as though she had been neutral or distinctly friendly. The argument of the District Judge in respect of possible commerce between enemy ports is especially inapt, when we consider that the carrier's contemplated ports of call were Cuban ports, and that Congress had enacted on April 20th—a week prior to the capture—that “the people of “the island of Cuba are, and by right ought to be, free “and independent.”

30 *U. S. Statutes at Large*, 739.

Moreover, commerce between the *Guido's* contemplated ports of call was *impossible*. All three of the ports, Havana, Matanzas and Cienfuegos, were under blockade by the proclamation of April 22nd. It is not suggested that she was proposing to violate the blockade.

30 *U. S. Statutes at Large*, 1769.

She knew nothing of the blockade, nor indeed did she know even of the state of war. She was still seventy miles from the first of her proposed ports of call.

If the *Guido* had been in one of our own ports loading a cargo of provisions for Spain, she would have been per-

mitted, under the terms of the proclamation, to complete such cargo and to proceed with it to her port of destination, enemy port though it might be, provided her cargo was not contraband and that the port was not a blockaded port.

Incidentally the District Judge suggests that the *Guido* is outside the proclamation because she might be informed of a condition of war before approaching our shores. Even if we admit that the spirit of the proclamation had no broader range than to permit Spanish merchant vessels, bound for our ports, instantly to seek safety in their own waters after knowledge of war, the *Guido* did not receive even that measure of grace. Her master was absolutely ignorant of any state of war.

An English case is peculiarly applicable, because it arose under the Order of Council of March 29th, 1854, which is in substantially the same phraseology as the Proclamation of April 26th. The *Argo*, a Russian vessel, was captured May 6th, in entering Queenstown Harbor. She pleaded the provisions of the Order in Council. The Order provided in terms exemption to any Russian merchant vessel which, prior to March 29th, should have sailed from any foreign port bound for any port in Her Majesty's dominions. The *Argo* had sailed in ballast from Havana in February, six weeks before the date of the Order, to take a cargo from Matanzas, Cuba. She sailed from Matanzas April 2nd, four days after the date of the Order, bound for Cork for orders. Dr. Lushington, after announcing that "all relaxation of belligerent rights emanating from the "Government" should receive "liberal construction," said:

"This vessel did sail from the Havannah prior  
 "to the date of the Order; she sailed from Matan  
 "zas subsequently to the date of the Order.  
 "When she left the Havannah she was in ballast  
 "bound for Cork, according to the charter party.  
 "It has been contended that this Order in Coun-  
 "cil contemplated that the Russian vessel should  
 "have been laden at the date of the Order; but I  
 "find no words in the Order that would justify my  
 "putting so strict a construction upon it. *Neither*

“do I think that there are any words which impose the necessity of not touching at or taking a cargo at some other port than that where the voyage commenced. For instance I apprehend that a vessel might have taken in a part of her cargo from one foreign port, having left that port prior to the 29th of March, and taken in another part of the cargo at another foreign port subsequently.

“The real meaning of the Order in Council, according to my view of it, is, that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah, and that the sailing from Havannah prior to March the 29th is a substantial compliance with the terms of the Order.”

*The Argo, Spinks's Prize Ct. Cases, 52, 53.*

It cannot be doubted that Dr. Lushington, upon the facts proved in this case, would discharge the *Guido*, and we submit that the construction given by the English courts to the Order in Council, which formed the basis of the President's proclamation, is entitled to the highest consideration by this Court.

If the *Guido* had taken any cargo at Antwerp for the United States there could be no argument against her right to go free.

If she had completed her Cuban ports, and had been captured while on her way from Cienfuegos to the United States there could be no argument against her right to exemption.

If her ports of call had been in the island of Jamaica instead of in the island of Cuba, the learned District Judge would not have thought of condemning her.

Are the rights of the owners of the steamer to be governed by such trifling accidental facts? Are they not entitled to a construction, in accord with the spirit and the letter of the proclamation, under which the steamer would go free?

### Third.

THE GUIDO WAS EXEMPT FROM CONDEMNATION UPON THE GROUND THAT SHE WAS OWNED BY NEUTRALS.

The steamer was registered in the name of a Spanish corporation, the Compania de Navegacion la Flecha; but the corporation was under the active management of the British firm of G. H. Fletcher & Company, of Liverpool, England (*Test. Affl.*, p. 5).

G. H. Fletcher & Company gave possession of the vessel to her master (*Deps. in Prep. Ans. to 4th Int.*, p. 21); and they generally managed the affairs of the steamer (*Test. Affl.*, pp. 4, 5).

It is apparent that the name of the corporation, Compania de Navegacion la Flecha, was adopted to identify the steamer with the house of the managers, G. H. Fletcher & Company.

The capital stock of the company was divided into one thousand shares. Two hundred shares stood in the name of William R. P. Jackson, of the firm of G. H. Fletcher & Company, and two hundred shares in the name of Thomas H. Jackson, both of whom were domiciled in England and were British subjects (*Test. Affl.*, pp. 5, 6). Two hundred shares stood in the name of Jose Serra y Font; two hundred shares in the name of Raimundo Real de Assua, and two hundred shares in the name of Raimon Real y Assua; all of whom were domiciled in Spain and were citizens of that kingdom.

All the certificates of these shares, however, and it appears by the test affidavit that the possession of the certificate establishes ownership thereof, have, for many years last past, been possessed by Mr. Jackson, who has been, and at the time of capture was, the true and lawful owner of all of the shares for value, and thereby the sole beneficial owner of the steamer (*Test. Affl.*, p. 5).

The steamer had, for fourteen years, been kept under the Spanish flag, as her trade lay regularly in round voyages

from Europe to Cuba, the United States, and back to Europe, to avail of the discriminations in favor of vessels carrying the Spanish flag in respect of commerce with the Colonies of Spain, such discrimination being granted in consideration of dues paid by said steamer to the Government of Spain (*Test. Affl.*, p. 5).

It further appears that the beneficial owner of the steamer contemplated that she should be kept in such trade only so long as it might be lawfully and peacefully carried on, and to withdraw her from the Spanish register and from under the Spanish flag and restore her to the British registry and British flag, whenever such trade should be disturbed; but that no opportunity therefor was afforded prior to her capture, such capture having taken place prior to any outbreak of hostilities, and before any state of war was known (*Test. Affl.*, p. 5).

The documents held by the steamer from Spain merely authorized her "to navigate as a merchant vessel according "to established laws" (á navegar y comerciar bajo las reglas establecidas); and pursue her "regular navigation "in legitimate commerce" (regular navegacion y legitimo comercio) "so long as she should carry the Spanish flag, "and should not change her capacity, her build, or her "equipment" (interin este buque se halle bajo el pabellon y no varie de capacidad y figura en el casco y aparejo) (*Exh. A*, pp. 36, 37).

If the facts asserted in the test affidavit are true—and proofs should be allowed in respect of them if they indicate a legal defence—it is submitted that the *Guido* should be treated as a neutral.

The phrase is common that the character of a ship is to be determined by the flag she carries, but like every phrase, we find upon examination that there are well defined exceptions.

Professor Lawrence, in one of the most recent books upon international law, says:

"A ship with an enemy captain and crew, employed in the trade of the enemy, would be "treated as enemy property, even though she be



“longed to a neutral owner, and the same fate  
 “would probably befall a neutral ship habitually  
 “sailing under the enemy’s flag, or taking a pass  
 “or license from the enemy.”

*Principles of International Law by Lawrence,  
 Sec. 182, p. 325.*

This extract intimates that the *ownership* of a vessel determines whether or not it is neutral, and that the rights of the owner are not effectually determined by the flag which he is carrying.

Moreover, in the courts of our country, especially in the more recent cases, it is found that a controlling feature leading to condemnation is the time and opportunity which the owner has had to make a change of flag and register.

The *Hallie Jackson* was condemned because, not only the vessel in fact “belonged to an enemy,” but because the owner’s “purpose to navigate her as such in defiance “of the laws and Government of the country to which “he owed allegiance” was indicated by his setting sail from Savannah “after the well known state of war between the seceding States and the United States was on “foot, and the proclamations of April 15, 19, 27, and “May 3 had been issued and were personally known to “the ship’s company and her owner at Savannah” and because he had carried a Confederate flag on the voyage out from Savannah, and in Matanzas whilst lying in that port, and again on the return voyage to the United States.

*The Hallie Jackson, Blatch. Prize Cas., 42.*

This array of facts would scarcely have been recited against the owner if the simple position of the registered ownership in the enemy, or the carrying of the enemy flag, would suffice to condemn the vessel.

The *William Bagaley* was captured July 18, 1863. She had been documented by the Confederate States June 16, 1863, by a register issued at Mobile, and was captured in striving to break the blockade of Savannah. She was owned by Cox, Brainard & Co., of Mobile. One Joshua

Bragdon, a loyal citizen of Indiana, claimed a one-sixth share in the vessel through his partnership in that firm. In sustaining the condemnation of the steamer the Court said:

“The omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious State, are attempted to be explained and justified because the same were, as alleged in the petition, confiscated during the rebellion under the authority of the rebel government. *More than a year, however, elapsed* after the proclamation of the blockade was issued before any such pretended confiscation.”

*The William Bagaley*, 5 Wall., 377, 408.

Reference was made by the Court to the fact that ships moreover, stand on different footing from other property, and after citing the case of the *Industrie* (cited by Dr. Lushington, 33 Eng. Law & Eq., 572), the Court continued:

“Principle of the decision is that whoever embarks his property in shares of a ship is in general bound by the character of the ship, whatever it may be, and that principle is as applicable to a citizen, after due notice and reasonable opportunity to dispose of his shares, as to a neutral” (p. 410).

Another case is that of a blockade runner which was captured between Mobile and Havana in December, 1863. The owner of the vessel, who had built her in Alabama, claimed her, asserting that he was loyal and was bringing her out of the enemy's country. The Court disposed of the case adversely to the claimant by saying:

“If the allegations of the claimant are true, he postponed his effort to escape too long to derive any benefit from it. The law does not permit such delay.”

*The Gray Jacket*, 5 Wall., 342, 368.

In the French and German war of 1870 *La Palme* was captured January 15, 1871, by the steamer *Bouragne*, and taken into Bordeaux for condemnation.

She was registered in the name of a German citizen, resident in Bremen, and carried the German flag. She was claimed by the Société des Missions de Bâle, Switzerland. The claimant asserted that the vessel had been purchased from Hanoverian owners in 1866, at which time she carried the Hanoverian flag; that the owner was a Swiss corporation; that Switzerland had no maritime flag; that the vessel had therefore continued for a time under the Hanoverian flag, and later had been put under the German flag, the title to the vessel being assigned to the resident agent or representative of the society in Bremen, through whom and in whose name she was documented.

War broke out between Germany and France in July, 1870. The vessel, when captured in January, 1871, was still flying the German flag. She was condemned in the court of original jurisdiction; upon the first appeal the decree of condemnation was revoked; but she was subjected to a fine in the way of *cautionnement* in the amount of 15,000 francs. Upon further appeal to the Conseil d'Etat the proceedings against her were entirely dismissed.

The decision was based upon two grounds:

- (1). That Switzerland had no maritime flag;
- (2). That Switzerland had rendered service to the French army during the war.

The Court held that either ground sufficed to set aside the capture.

*La Palme, Recueil General des Lois & Arrêts, Sirey, Devilleneuve & Carrette, 1873, Part 2, p. 237.*

The editors append this note to the decision:

“NOTE.—Ces résolutions ne sont pas sans précédents. A plusieurs reprises, le gouvernement Français a consenti, soit par des considérations d'équité, soit par des motifs politiques, à se départir du droit qui lui appartient de déclarer de

“bonne prise la capture de tout bâtiment portant  
“le pavillon ennemi.”

“These conclusions are not without precedent.  
“In many captures the French Government has  
“consented through considerations of equity, or  
“through political reasons, to refrain from the  
“right which belonged to her of declaring good  
“prize every ship carrying the enemy’s flag.”

There was no opportunity open to the owner of the *Guido* to abandon the Spanish flag and register. The steamer was captured April 27th, on the high seas. She had been in no port since she sailed from La Puebla, April 10th, eleven days before the beginning of the war.

#### **Fourth.**

THERE WAS NO SUFFICIENT PROBABLE CAUSE FOR THE ORIGINAL CAPTURE, AND THE CAPTORS SHOULD THEREFORE BE CONDEMNED TO PAY THE EXPENSES OF THE CAPTURE AND THE COSTS OF THE LITIGATION.

The President’s proclamation, under which the *Guido* was privileged from capture and condemnation, was issued April 26th, one day before her capture, and two days before the libel was filed against her.

Her captors and her prosecutors were bound to know of her privileges, and they acted at their peril.

Pending the appeal the steamer has been sold as perishable property (*Record*, pp. 14, 15), and therefore physical restoration of the steamer to the claimant is impossible. A decree for the payment of the fund resulting from the sale, together with a decree against the captors for the expenses of the capture and the costs of the suit, is the only relief that can be given.

**Fifth.**

THE DECREE OF THE DISTRICT COURT SHOULD BE REVERSED, AND A MANDATE SHOULD ISSUE DIRECTING THE COURT IN THE WAY OF RESTORATION TO PAY OVER TO THE CLAIMANT THE PROCEEDS OF SALES OF THE GUIDO AND TO CHARGE UPON THE CAPTORS THE EXPENSES OF THE CAPTURE AND THE COSTS OF THE SUIT, AND TO TAKE ALL NECESSARY PROCEEDINGS TO THAT END.

If the decree of restoration is based solely upon the neutral ownership of the *Guido*, it may be that the Court will require further proofs.

If the decree is based upon the privilege extended by the President's proclamation of April 26th, we submit that the proofs given *in preparatorio*, and those found in the ship's papers are sufficient.

BUTLER, NOTMAN, JOLINE & MYNDERSE,  
*Proctors for Claimant-Appellant.*

WILHELMUS MYNDERSE,  
*Advocate.*

**APPENDIX.**

AT THE COURT OF BUCKINGHAM PALACE

the 29th day of March, 1854,

Present,

The Queen's most Excellent Majesty in Council.

Her Majesty, being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof is pleased by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on before the expiration of the above term: Provided, that nothing herein contained shall extend to or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships shall be permitted to continue her voyage to any port not blockaded.

And the right honourable the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.